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April 28, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal
Date of Filing: October 18, 2004
Case No.: TIA-0258

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determinations, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at

a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.'

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.¹ Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.² Subpart E provides that all Subpart D claims will be considered as Subpart E claims.³ OHA continues to process appeals until the DOL commences Subpart E administration.

B. Procedural Background

The Applicant was employed as a welder and an inspector welder at the DOE's Oak Ridge plant (the plant) for approximately twenty-one years.

The Applicant filed an application with the OWA, requesting physician panel review of several illnesses: chronic obstructive pulmonary disease (COPD), emphysema, asbestosis, hiatal hernia, hearing loss, diabetes, congestive heart failure, and arthritis.

The Panel issued a positive determination for COPD, emphysema and asbestosis. With respect to the other illnesses, the Panel determined that there was no basis for

¹ Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

² See *id.* § 3675(a).

³ See *id.* § 3681(g).

finding that these conditions were related to toxic exposure at a DOE site.

The Applicant disagrees with the Physician Panel's negative determinations. He states that his hiatal hernia and hearing loss were caused by physical exertion, and noise, respectively, at DOE. He also states that the Panel report incorrectly indicated a short break in his employment and incorrectly referred to a family history of spina bifida and arthritis. Finally, he states that he is unable to locate some medical information from former doctors.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant's arguments that physical exertion at DOE caused his hiatal hernia and that noise at DOE caused his hearing loss, do not indicate Panel error. The Physician Panel Rule required that the Panel consider whether a claimed illness was related to exposure to a "toxic substance". Under 10 C.F.R. § 852.1(a)(3), "toxic substance" is defined as "any material that has the potential to cause illness or death because of its radioactive, chemical or biological nature." Physical exertion and noise are not toxic substances and, therefore, outside the scope of the Rule.⁴

The Applicant's contentions of factual errors concerning his period of employment and medical history are not supported by the record. The record indicates the break in employment,⁵ and the Panel's discussion of the Applicant's

⁴ See 67 Fed. Reg. 52843. Because his claim of hiatal hernia is outside the scope of the Rule, we need not consider the argument that the Panel misidentified the doctor who diagnosed that condition.

⁵ See Record, at 512-519.

medical history was based on his medical records.⁶ Contrary to the Applicant's assertion, the Panel report contains no reference to a family history of arthritis.

Finally, the Applicant's arguments that he has been unable to obtain some medical records from prior doctors does not indicate Panel error. The Applicant has failed to explain how those records would have changed the Panel's determination, and the absence of those records does not indicate Panel error.

As the foregoing indicates, the Applicant has not identified Panel error. Accordingly, the appeal should be denied.

In compliance with Subpart E, these claims will be transferred to the DOL for review. OHA's denial of these claims does not purport to dispose of or in any way prejudice the Department of Labor's review of the claims under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0258 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claims and not to the DOL's review of these claims under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: April 28, 2005

⁶ See *id.* at 47.